

1 Matthew D. Murphey, Esq. (SBN 194111)
2 TROUTMAN SANDERS LLP
3 550 West B Street, Suite 400
San Diego, CA 92101-3599
Tel: (619) 235-4040 / Fax: (619) 231-8796
Email: matt.murphey@troutmansanders.com

9 Attorneys for Defendant
10 LIFE TECHNOLOGIES CORP.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

TROLL BUSTERS, LLC,

Plaintiff,

V.

ROCHE DIAGNOSTICS GMBH, ROCHE MOLECULAR SYSTEMS (RMS), ROCHE DIAGNOSTICS CORP. D/B/A ROCHE APPLIED SCIENCES, EUROGENETEC NORTH AMERICA INC., CLONTECH LABORATORIES INC., INTEGRATED DNA TECHNOLOGIES (IDT), LIFE TECHNOLOGIES CORP., QIAGEN NV., THERMO FISHER SCIENTIFIC, INC., QUANTA BIOSCIENCES, INC., GENE LINK INC., GENSCRIPT USA INC., EMD CHEMICALS INC., TRILINK BIOTECHNOLOGIES INC., and CEPHIED.

Defendants.

Case No. 11-cv-0056 IEG (WVG)

**LIFE TECHNOLOGIES CORP.'S
NOTICE OF JOINDER AND JOINDER
IN DEFENDANTS ROCHE
MOLECULAR SYSTEMS AND
ROCHE DIAGNOSTICS CORP.'S
MOTION TO DISMISS (DKT. NO. 91)**

Date: June 13, 2011
Time: 10:30 a.m.
Courtroom: 1, Fourth Floor
Judge: Hon. Irma E. Gonzalez

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that defendant Life Technologies Corp. ("Life Tech") hereby joins in co-defendants Roche Molecular Systems and Roche Diagnostics Corp.'s

1 (collectively “Roche’s”) Motion to Dismiss (Dkt. No. 91), for all of the reasons set forth
 2 therein. Life Tech reserves the right to participate in any further briefing and oral argument.

3 Each of the arguments presented in Roche’s Motion to Dismiss also applies to Troll
 4 Busters’ allegations against Life Tech. Troll Busters’ allegations against Life Tech fail to
 5 meet the required pleadings standards of Fed. R. Civ. P. 9(b) for the same reasons that Troll
 6 Busters’ allegations against Roche fail, as outlined in Roche’s Motions to Dismiss. First,
 7 Troll Busters has failed to plead facts that permit an inference that Life Tech acted with the
 8 intent to deceive the public. Instead, Troll Busters offers nothing more than the conclusory
 9 allegation that Life Tech “intended to deceive the public by marking the products or forcing
 10 its licensees to mark its licensed products with one or more of the Expired Patents and/or
 11 using said expired Patents in advertising materials available to the general public.” (Dkt. No.
 12 84, ¶ 135). Such conclusory allegations are insufficient. Further, Troll Busters pleads facts
 13 showing that Life Tech did **not** intent to deceive the public by pleading that Life Tech
 14 “attempted to disable some links within its website, but the falsely marked expired patents
 15 still appear.” (Dkt. No. 84, ¶ 83). Allegations that Life Tech attempted to remove accused
 16 materials contradict Troll Busters’ vague assertions that “Defendants’ intent is further
 17 demonstrated by their post-suit conduct.” (Dkt. No. 84, ¶¶ 104, 134). As set forth in Roche’s
 18 Motion to Dismiss, such bald, conclusory allegations regarding intent cannot survive a motion
 19 to dismiss as a matter of law.

20 Similarly, Troll Busters’ First Amended Complaint fails to allege a factual basis to
 21 support the conclusory allegation that Life Tech actually knew the patents at issue had
 22 expired. (*See* Dkt. No. 84, ¶¶ 110, 134). Troll Busters’ allegation that the defendants are
 23 large, sophisticated companies who have experience with the patent system was recently
 24 addressed by the Federal Circuit and held to be insufficient to survive a motion to dismiss. *In*
 25 *re BP Lubricants USA Inc.*, 2011 WL 873147, 1-2 (Fed. Cir. Mar. 15, 2011); (*See* Dkt. No.
 26 84, ¶¶ 97-100). Further, not only are Troll Busters’ allegations that “[a]rticles and discussions
 27 in industry publications described the expiration of at least the ’202 Patent, ’195 Patent and
 28 ’188 Patent” unacceptably vague, they also have no applicability to Life Tech as Troll Busters

1 has not alleged that Life Tech falsely marked with these patent numbers. (*Compare* Dkt. No.
 2 84, ¶ 105 *with* Dkt. No. 84, ¶¶ 81-82). And, as explained in Roche's Motion to Dismiss,
 3 allegations that Life Tech, as a licensor, must have known of the expiration of the patents is
 4 no more than speculation. (*Compare* Dkt. No. 84, ¶ 101, 102 *with* Dkt. No. 91-1 at 8).

5 Second, Troll Busters has failed to sufficiently plead that Life Tech engaged in any
 6 conduct prohibited by the false marking statute. As Roche's Motion to Dismiss lays out, the
 7 False Marking Statute only prohibits "mark[ing a patent number] upon, or affix[ing a patent
 8 number] to, or "us[ing a patent number] in advertising" an unpatented article. (Dkt. No. 91-1
 9 at 9-11 (citing 35 U.S.C. § 292(a))). Troll Busters does not sufficiently allege that Life Tech
 10 marked, affixed, or advertised a patent number on an unpatented article. There are simply no
 11 specific factual allegations in the First Amended Complaint that the patents at issue were
 12 marked upon or affixed to Life Tech's products or their packaging. Troll Busters fails to
 13 identify the language it considers to be a false marking, when and where the language was
 14 used and who made the decision to use it. (*See* Dkt. No. 94, ¶¶ 81-82, 133). The generalized
 15 allegation that patent numbers were used with Life Tech's products is not sufficient to survive
 16 a motion to dismiss because only certain uses of patent numbers are prohibited under the
 17 False Marking Statute. (*See* Dkt. No. 91-1 at 8-9.) Nor does Troll Busters identify any
 18 alleged wrongful advertisements, when or where any alleged improper language was used, or
 19 how Life Tech used the patents in a manner importing or suggesting that the products were
 20 covered by such patents. (*See* Dkt. No. 84, ¶¶ 45, 70, 81-83, 103, 133, 134).

21 Life Tech also joins in Roche's arguments that the False Marking Statute is
 22 unconstitutional. As explained in Roche's Motion to Dismiss, the False Marking Statute fails
 23 to provide sufficient control to the Executive Branch and because it undermines the principle
 24 of separation of powers. (*See* Dkt. No. 91-1 at 14-22.)

25 This joinder is based on this Notice of Joinder and Joinder, Roche Molecular Systems
 26 and Roche Diagnostics Corp.'s Notice of Motion and Motion to Dismiss, their Supporting
 27 Memorandum and Points and Authorities, the accompanying declaration and exhibits thereto,
 28 their Notice of Challenge to Constitutionality of a Statute Pursuant to FRCP 5.1, the

1 pleadings, records, and files in this action, and such other arguments and evidence as may be
2 presented prior to and at the hearing on this motion.

3

4 Dated: May 9, 2011

/s/ Matthew D. Murphey

5 Matthew D. Murphey, Esq.

6 TROUTMAN SANDERS LLP

7 Attorneys for Defendant

8 LIFE TECHNOLOGIES CORP.

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on May 9, 2011 to all counsel of record who are deemed to have consented to electronic service for the Court's CM/ECF system per Civil Local Rule 5.4. Any other counsel of record will be served by electronic mail, facsimile and/or overnight delivery.

Dated: May 9, 2011

/s/ Matthew D. Murphey